

**EDWARD E. KOPKO**

**L A W Y E R**

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Wednesday, May 26, 2010

Senior Judge Thomas J. McAvoy  
U.S. District Court  
Northern District of New York  
James T. Foley – U.S. Courthouse  
445 Broadway, Room 509  
Albany, New York 12207-2924

Via ECF

**Reference: Estate of Timothy A. Loveria by Gregorio O. Loveria, Administrator, vs.  
Portadam Inc., Robert Gatta and Timothy Brearman  
Case No.: 3:09-cv-01215**

**Letter-Motion to Relieve Plaintiff's from Judgment pursuant to F.R.C.P. Rule 60(b)**

Dear Judge McAvoy:

It appears my motion for leave to file a sur-reply and Your Honor's decision to grant defendants summary judgment passed one another simultaneously via the CM-ECF system yesterday. Having filed the motion for a sur-reply prior to the return date of the motion, Friday, May 28, 2010,<sup>1</sup> prompts me to respectfully request relief from judgment pursuant to Rule 60 of the Rules of Civil Procedure.

Rule 60 provides, *in relevant part*, that "the court may relieve a party or its legal representative from final judgment, order, or proceeding for the following reasons:

- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered to move for a new trial under Rule 59(b);
- (6) any other reason that justifies relief."

I contend that subdivision (2) applies because an integral argument in the motion for leave to file a sur-reply was a request for a continuance of the motion pursuant to Rule 56(f), to allow Plaintiff to conduct discovery and obtain "newly discovered evidence," material facts Plaintiff reasonably believes exist that are reasonably believed to created genuine issues of material fact. I also contend that subdivision (6) applies in the interests of justice and equity.

In any event, it seems inequitable that a dispositive pre-answer motion for summary judgment, filed prior to any discovery, has been granted prior to the return date of the motion and without consideration by the Court of Plaintiff's motion for leave to file a sur-reply.

Therefore, Plaintiff respectfully requests that Your Honor consider the motion for leave to file a sur-reply. If Your Honor agrees that the relief requested in that motion is proper and appropriate under the circumstances, then Plaintiff respectfully requests that this Court relieve Plaintiff from the Judgment filed in this action and allow Plaintiff to conduct discovery. Of course, if Your Honor considers Plaintiff's motion and still concludes that summary judgment is still warranted to the defendants, the Decision and Order and Judgment stand.

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<sup>1</sup> Minute Entry: MOTION CALENDAR held 5/10/2010 bef Sr. Judge Thomas J. McAvoy in Albany, NY: APP/CR/LC/CRD: None. Defts' [17] MOTION for Summary Judgment - ADJOURNED until 5/28/10 in Binghamton. (cml)

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May I please know Your Honor's pleasure regarding this request/motion?

Thank you.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward E. Kopko", with a stylized flourish at the end.

Edward E. Kopko

EEK/juv

cc: Jonathan M. Bernstein, Esq. – via ECF